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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 **EDWARD STEVEN DAVIS,**
12 Inmate Booking No. 13711805

13 Plaintiff,

14
15 vs.
16

17 **RONALD A. MENDES; J. DUNN;**
18 **KYLE SUTTERLY; STATE OF**
19 **CALIFORNIA; DISTRICT**
20 **ATTORNEYS OFFICE,**

21 Defendants.
22

CASE NO. 13-cv-1817 BEN
(RBB)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA*
PAUPERIS;**

**(2) DENYING MOTION FOR
APPOINTMENT OF COUNSEL;
AND**

**(3) DISMISSING COMPLAINT
FOR SEEKING MONETARY
DAMAGES AGAINST
DEFENDANTS WHO ARE
IMMUNE AND FOR FAILING TO
STATE A CLAIM PURSUANT TO
28 U.S.C. §§ 1915(e)(2)(B) & 1915A**

23 Plaintiff, currently housed at the George Bailey Detention Facility, and proceeding
24 pro se, has filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. (ECF No. 1.) In
25 addition, Plaintiff has filed two addendums to his original Complaint, along with a
26 Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) and a
27 Motion to Appoint Counsel. (ECF Nos. 2, 3, 7, 9.)
28

I. MOTION TO PROCEED IFP

All parties instituting any civil action, suit, or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). An action may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for ... the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court must assess an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution having custody of the prisoner must collect subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has submitted a certified copy of his trust account statements pursuant to 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. These statements show Plaintiff has a zero available balance in his account, and therefore, insufficient funds with which to pay any initial partial filing fee. *See* 28 U.S.C. § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing a civil action or appealing a civil action or criminal judgment for the reason that the prisoner has no assets and no means by which to pay [an] initial partial

1 filing fee.”); *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a
 2 “safety-valve” preventing dismissal of a prisoner’s IFP case based solely on a “failure
 3 to pay ... due to the lack of funds available.”).

4 Therefore, the Court **GRANTS** Plaintiff’s Motion to Proceed IFP (ECF No. 2),
 5 and assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire
 6 balance of the \$350 filing fee owed in this case shall be collected and forwarded to the
 7 Clerk of the Court pursuant to the installment payment provisions set forth in 28 U.S.C.
 8 § 1915(b)(1).

9 **II. SCREENING PURSUANT TO 28 U.S.C. § 1915(e)(2)**

10 A complaint filed by any person proceeding IFP is subject to sua sponte dismissal
 11 to the extent it is “frivolous, malicious, fail[s] to state a claim upon which relief may be
 12 granted, or seek[s] monetary relief from a defendant immune from such relief.” 28
 13 U.S.C. § 1915(e)(2)(B); *Calhoun v. Stahl*, 254 F.3d 845, 845 (9th Cir. 2001) (per curiam)
 14 (holding that “the provisions of 28 U.S.C. § 1915(e)(2)(B) are not limited to prisoners.”);
 15 *Lopez v. Smith*, 203 F.3d 1122, 1127 (9th Cir. 2000) (en banc) (“[S]ection 1915(e) not
 16 only permits, but requires a district court to dismiss an in forma pauperis complaint that
 17 fails to state a claim.”).

18 “[W]hen determining whether a complaint states a claim, a court must accept as
 19 true all allegations of material fact and must construe those facts in the light most
 20 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*
 21 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (§ 1915(e)(2) “parallels the
 22 language of Federal Rule of Civil Procedure 12(b)(6).”). However, while liberal
 23 construction is “particularly important in civil rights cases,” *Ferdik v. Bonzelet*, 963 F.2d
 24 1258, 1261 (9th Cir. 1992), the Court may not “supply essential elements of the claim
 25 that were not initially pled.” *Ivey v. Board of Regents of the University of Alaska*, 673
 26 F.2d 266, 268 (9th Cir. 1982). The district court should grant leave to amend, however,
 27 unless it determines that “the pleading could not possibly be cured by the allegation of
 28 other facts” and if it appears “at all possible that the plaintiff can correct the defect.”

1 *Lopez*, 203 F.3d at 1130-31.

2 Plaintiff is seeking three (3) million dollars in compensatory damage and one (1)
3 million dollars in punitive damages for an alleged “false prosecution” and seeks to have
4 “these bogus charges dropped and punishment reversed.” (Compl. at 11.)

5 A federal court cannot interfere with ongoing state criminal proceedings by
6 granting injunctive relief absent a showing of the state’s bad faith or harassment, or a
7 showing that the statute challenged is “flagrantly and patently violative of express
8 constitutional prohibitions.” *Younger v. Harris*, 401 U.S. 37, 46, 53-54 (1971).

9 *Younger* abstention is appropriate if four criteria are met: (1) state judicial
10 proceedings are ongoing; (2) the state proceedings implicate an important state interest;
11 and (3) the state proceedings offer an adequate opportunity to litigate federal questions;
12 and (4) the federal court action would “enjoin the proceeding or have the practical effect
13 of doing so, i.e., would interfere with the state proceeding in a way that *Younger*
14 disapproves.” *San Jose Silicon Valley Chamber of Commerce PAC v. City of San Jose*,
15 546 F.3d 1087, 1092 (9th Cir. 2008). Here, based on Plaintiff’s allegations that he has
16 ongoing criminal proceedings in state court and requests this Court’s intervention,
17 abstention pursuant to the *Younger* doctrine is warranted.

18 Additionally, in order to recover damages for an allegedly unconstitutional
19 criminal conviction, a plaintiff must show that his criminal conviction has already been
20 invalidated. *Heck v. Humphrey*, 512 U.S. 477, 486-87 (1994); *Ramirez v. Galaza*, 334
21 F.3d 850, 855-56 (9th Cir. 2003) (“Absent such a showing, ‘[e]ven a prisoner who has
22 fully exhausted available state remedies has no cause of action under § 1983....’”)
23 (quoting *Heck*, 512 U.S. at 489), *cert. denied*, 124 S. Ct. 2388 (2004).

24 *Heck* holds that “in order to recover damages for allegedly unconstitutional
25 conviction or imprisonment, or for other harm caused by actions whose unlawfulness
26 would render a conviction or sentence invalid, a plaintiff must prove that the conviction
27 or sentence has been reversed on direct appeal, expunged by executive order, declared
28 invalid by a state tribunal authorized to make such determination, or called into question

1 by a federal court's issuance of a writ of habeas corpus." *Heck*, 512 U.S. at 486-87. A
 2 claim for damages challenging the legality of a conviction or sentence that has not been
 3 so invalidated is not cognizable. *Id.* at 487; *Edwards v. Balisok*, 520 U.S. 641, 643
 4 (1997).

5 In *Heck*, the Supreme Court held that:

6 when a state prisoner seeks damages in a section 1983 suit, the
 7 district court must consider *whether a judgment in favor of the*
 8 *plaintiff would necessarily imply the invalidity of his*
 9 *conviction or sentence*; if it would, the complaint must be
 10 dismissed unless the plaintiff can demonstrate that the
 11 conviction or sentence has already been invalidated. But if the
 12 district court determines that the plaintiff's action, even if
 13 successful, will not demonstrate the invalidity of any
 14 outstanding criminal judgment against the plaintiff, the action
 15 should be allowed to proceed.

16 *Heck*, 512 U.S. at 487 (emphasis added). An action that is barred by *Heck* should be
 17 dismissed for failure to state a claim without prejudice to Plaintiff's right to file a new
 18 action if he succeeds in invalidating his conviction. *Edwards*, 520 U.S. at 649.

19 Here, Plaintiff's claims of "false prosecution" will "necessarily imply the
 20 invalidity" of his criminal conviction. *Heck*, 512 U.S. at 487. Accordingly, because
 21 Plaintiff seeks damages for an allegedly unconstitutional criminal conviction and
 22 because he has not alleged that his conviction has already been invalidated, a claim for
 23 damages has not yet accrued.

24 In addition, the Court must dismiss Plaintiff's claims for money damages against
 25 all of the named Defendants who are Deputy District Attorneys. Criminal prosecutors
 26 are absolutely immune from civil damages suits premised upon acts committed within
 27 the scope of their official duties which are "intimately associated with the judicial phase
 28 of the criminal process." *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976); *see also*
Buckley v. Fitzsimmons, 509 U.S. 259, 272-73 (1993); *Burns v. Reed*, 500 U.S. 478, 487-
 93 (1991). A prosecutor is immune even when the prosecutor's malicious or dishonest
 action deprived the defendant of his or her liberty. *Ashelman v. Pope*, 793 F.2d 1072,
 1075 (9th Cir. 1986). Thus, Plaintiff's claim against Defendants Mendes, Dunn, and
 Sutterly must be dismissed pursuant to 28 U.S.C. § 1915(e)(2)(B)(iii) for seeking

1 monetary relief against defendants who are immune from such relief, without leave to
2 amend.

3 For all these reasons, the Court finds that Plaintiff's Complaint must be
4 **DISMISSED** sua sponte for failing to state a claim upon which relief can be granted and
5 for seeking monetary damages against immune defendants pursuant to 28 U.S.C. §
6 1915(e)(2)(B).

7 This Court also notes that the Plaintiff asks that "any punishment be reversed and
8 the case dismissed," in the event he has been convicted as of this Court's ruling. (ECF
9 No. 9 at 3). This Court is unaware of the Plaintiff's current status. However, Plaintiff
10 is cautioned that "habeas corpus is the exclusive remedy for a state prisoner who
11 challenges the fact or duration of his confinement and seeks immediate or speedier
12 release, even though such a claim may come within the literal terms of § 1983." *Heck*,
13 512 U.S. at 481 (discussing *Preiser v. Rodriguez*, 411 U.S. 475 (1973)).

14 **III. CONCLUSION AND ORDER**

15 Good cause appearing, **IT IS HEREBY ORDERED:**

16 1. Plaintiff's Motion for Appointment of Counsel [ECF No. 3] is **DENIED**
17 without prejudice.

18 2. Plaintiff's Motion to proceed IFP pursuant to 28 U.S.C. § 1915(a) [ECF No.
19 2] is **GRANTED**.

20 3. The Watch Commander for George Bailey Detention Facility, or his
21 designee, shall collect from Plaintiff's prison trust account the \$350 balance of the filing
22 fee owed in this case by collecting monthly payments from the account in an amount
23 equal to twenty percent (20%) of the preceding month's income and forward payments
24 to the Clerk of the Court each time the amount in the account exceeds \$10 in accordance
25 with 28 U.S.C. § 1915(b)(2). **ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED**
26 **BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

27 4. The Clerk of the Court is directed to serve a copy of this Order on Watch
28 Commander, George Bailey Detention Facility, 446 Alta Road, Suite 5300, San Diego,

1 California 92158.

2 5. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28
3 U.S.C. §§ 1915(e)(2)(b) and 1915A(b). Plaintiff is granted forty five (45) days leave
4 from the date this Order is "Filed" in which to file a First Amended Complaint which
5 cures all the deficiencies of pleading noted above. Plaintiff's Amended Complaint must
6 be complete in itself without reference to the superseded pleading. *See* S.D. Cal. Civ.
7 L. R. 15.1. Defendants not named and all claims not re-alleged in the Amended
8 Complaint will be deemed to have been waived. *See King v. Atiyeh*, 814 F.2d 565, 567
9 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint fails to state a claim upon
10 which relief may be granted, it may be dismissed without further leave to amend and
11 may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See McHenry v.*
12 *Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

13 6. The Clerk of Court is directed to mail a form § 1983 complaint to Plaintiff.

14 **IT IS SO ORDERED.**

15
16 DATED: Nov. 1, 2013


HON. ROGER T. BENITEZ
United States District Judge